Supreme Court, U.S.
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No. 03-1093

In The Supreme Court of the United States

ROLAND A. SHELTON,

Petitioner,

v.

MARYANN C. SHELTON,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Nevada

---

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

James L. Buchanan II
Counsel of Record
300 South Maryland Parkway
Las Vegas, Nevada 89101
(702) 382-9103

David C. Amesbury
Of Counsel
AMESBURY & SCHUTT
703 South Eighth Street
Las Vegas, Nevada 89101
(702) 385-5570

Counsel for Respondent

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

QUESTIONS PRESENTED FOR REVIEW

1. Were the petitioner's federal law arguments conclusively resolved against him by a final state court consent decree of divorce which he undisputedly failed to appeal?

2. Can a state court make an award of indemnity, under the state common law of contracts, against a party who waives military retirement benefits, thereby depriving his former spouse of a legal interest in those benefits established by a previous final consent judgment?

LIST OF PARTIES BELOW

Roland A. Shelton, petitioner

Maryann C. Mitchell (formerly Maryann C. Shelton), respondent

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The Respondent, Maryann C. Mitchell (formerly Sheldon), respectfully submits that the Petition For Writ Of Certiorari should be dismissed for lack of a substantial federal question, or in the alternative simply denied.

OPINIONS BELOW

The respondent is satisfied with this portion of the Petition.

BASIS FOR JURISDICTION

Contrary to the Petition, this Court does not have jurisdiction to hear an appeal in this case. Under 12 U.S.C. § 1257 (Westlaw 2003), the Supreme Court may hear appeals from state courts only where a substantial federal question is presented. As set forth more fully in part I of the argument section of this brief, this case is fully controlled by the state law of res judicata. Because no substantial issue of federal law remains open for decision, the respondent wife submits that the Court lacks jurisdiction to grant the Petition.

STATEMENT OF THE CASE

This case began as a divorce action filed in 1997 in the state courts of Nevada. The initial pleading, styled as a Joint Petition for Summary Decree of Divorce and signed by both parties, was filed on January 17, 1997. Almost immediately thereafter, on January 24, 1997, the state court granted a consent decree of divorce (App. 13a).

The language of the consent divorce decree is essential to a full understanding of the post-judgment issues. The

consent divorce decree, in language taken directly from the joint divorce petition, provided as follows:

> That the Petitioners have certain *community property* and have agreed to divide it as follows:
>
> A. to Co-Petitioner Roland A. Shelton:
>
> . . . .
>
> 14. One half of military retirement in the amount of $500 and *military disability* in the amount of $174.
>
> B. to Co-Petitioner Maryann C. Shelton:
>
> . . . .
>
> 10. One-half of HUSBAND's military retirement in the amount of $577, until her demise.
>
> That the Co-Petitioners further agree to fairly and equitably divide remaining community property not herein listed.

(App. 13a-14a (emphasis added).)

As the Court can see, both the petition and the divorce decree include a list of assets expressly classified as "community property." Among the assets so classified was $174 per month in the husband's veterans' disability benefits—the only disability benefits the husband was

receiving at the time. The decree also divided the husband's military retirement benefits, a step which both parties agree the state court was permitted to take. The divorce decree was not appealed by either party.

In 1999, over two years after the divorce decree became a final judgment of the state court, the husband ceased compliance with the above-quoted provisions. On November 9, 2000, the wife filed a motion in state court to enforce compliance with the consent divorce decree.

In his response to the wife's petition, the husband argued for the first time in the history of this case that the consent divorce decree was inconsistent with federal law. In particular, he alleged that he had voluntarily elected to waive military retirement benefits in full, and to receive veterans' disability benefits in their place, and that his veterans' disability benefits were not subject to division as a matter of federal law. *See* 10 U.S.C. § 1408 (2003); *Mansell v. Mansell*, 490 U.S. 581 (1989). He offered no explanation for why he had not raised this federal law issue as an objection to the state court divorce decree, which once again unambiguously stated that the husband's disability benefits were *community property* (App. 13a).

The state trial court desired to give the wife relief under state law, but held that relief was barred by this Court's opinion in *Mansell* (App. 11a). The wife appealed to the Nevada Supreme Court, arguing that federal law allowed the wife to claim relief under at least two theories, res judicata and contractual indemnity.

Accepting the wife's arguments, the Nevada Supreme Court reversed the decision below (App. 1a). The court recognized that division of veterans' disability pay was permitted under state law principles of res judicata, and it construed the decree to award the wife $577 per month in

benefits regardless of source, but it did not further address the wife's res judicata argument.

Instead, the court joined the great majority of other states in granting the wife relief on a theory of contractual indemnity. The Petition For Certiorari alleges that the court divided the husband's disability benefits, but this is simply not true. The wife never sought, and the Nevada Supreme Court did not make, an actual division of the husband's disability benefits. Every dollar of the husband's disability benefits has gone and will continue to go directly to the husband.

What the Nevada Supreme Court did was to make an award of monetary damages against the husband under the law of contractual indemnity. The consent divorce decree, which is a contract as well as a judgment, obligated the husband to pay the wife $577 per month from his military retirement pay. Instead of paying the wife the benefit which he promised to pay, the husband *voluntarily* chose to waive his military retirement entirely. That waiver was a breach of the husband's agreement to pay the wife $577 per month from his retirement pay. Both parties agree that state courts are permitted to divide military retirement pay. Because federal law allows an award of indemnity, payable in full from the husband's nondisability assets, the decision of the trial court was reversed and remanded.

If the present holding of the Nevada Supreme Court remains unchanged, the wife expects to receive upon remand contract law damages of $577 per month – the amount of the harm inflicted upon her by the husband's breach of the consent divorce decree. The Nevada Supreme Court has already held that the husband "possesses ample other assets from which to pay his obligation without ever touching his disability pay" (App. 9a).

ARGUMENT

I. THE PETITIONER'S FEDERAL LAW ARGUMENTS ARE CONCLUSIVELY RESOLVED AGAINST HIM BY THE FINAL STATE COURT CONSENT DECREE OF DIVORCE, WHICH HE UNDISPUTEDLY FAILED TO APPEAL.

The cornerstone of the petitioner husband's position in this case is his assertion that federal law prevents state courts from treating veterans' disability benefits as community property. *Mansell v. Mansell*, 490 U.S. 581 (1989). But the husband himself voluntarily signed a joint divorce petition and consent divorce decree which unambiguously stated that $174 per month in disability benefits were community property. That decree, as construed by the state courts of Nevada, awards the wife $577 per month as her share of the husband's retirement benefits, regardless of any future waiver of those benefits. The husband failed to appeal from the consent divorce decree, and it became a final and operative judgment under state law. The husband raised no issue under *Mansell* until several years after the consent divorce decree became final. Because the husband failed to raise his federal issues by appeal from the consent divorce decree, the state court order at issue is fully justified by basic state law principles of res judicata.[1]

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[1]"[A] valid judgment for plaintiff is conclusive not only as to defenses which were set up and adjudicated, but also as to those which might have been raised." *Weisheyer v. Weisheyer*, 54 Nev. 76, 6 P.2d 439, 441 (1932). "The modern view is that claim preclusion embraces all grounds of recovery that were asserted in a suit, as well as those that could have been asserted, and thus has a broader reach than collateral estoppel." *University of Nevada v. Tarkanian*, 110 Nev. 581, 879

The power of state courts to divide veterans' disability benefits under the law of res judicata is established by *Mansell* itself. The parties in *Mansell* were divorced in California in 1979. The divorce decree was based upon a separation agreement. Both the agreement and the decree expressly divided that portion of the husband's military retirement pay which he had waived in order to receive veterans' disability pay. Four years later, the husband filed a motion to reopen the divorce decree, arguing that the waived retirement benefits could not be divided as a matter of federal law. The California trial court denied the motion. The California appellate courts affirmed.

On appeal, this Court reversed the California holding that federal law permits division of disability benefits under the only theory applied in the California state courts – the law of community property. But this Court did not hold that the disability benefits could not be divided under other theories. On the contrary, the Court recognized that they *could* be divided on a theory of res judicata:

> In a supplemental brief, Mrs. Mansell argues that the doctrine of res judicata should have

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P.2d 1180, 1192 (1994), *modified on other grounds, Executive Management v. Ticor Title Ins. Co.*, 114 Nev. 823, 963 P.2d 465 (1998); *see also Dermody v. City of Reno*, 113 Nev. 207, 931 P.2d 1354 (1997); *Gulling v. Washoe County Bank*, 24 Nev. 477, 56 P. 580, 582 (1899) (final decision is still res judicata, "[h]owever erroneous that judgment and decree may be"). The decision below created no right not already recognized by the original consent divorce decree, as construed by the state court. Thus, federal preemption is an issue which could and should have been raised by appeal from that decree. Because the husband failed to raise the issue in such an appeal, he is barred from raising it now.

> prevented this pre-*McCarty* property settlement from being reopened. *McCarty v. McCarty*, 453 U.S. 210, 101 S. Ct. 2728, 69 L. Ed. 2d 589 (1981). The California Court of Appeal, however, decided that it was appropriate, under California law, to reopen the settlement and reach the federal question. [Citation omitted.] *Whether the doctrine of res judicata, as applied in California, should have barred the reopening of pre-McCarty settlements is a matter of state law over which we have no jurisdiction.*

Id. at 586 n.5. The emphasized passage clearly recognizes that state courts are permitted to hold that a final order dividing veterans' disability benefits is beyond collateral attack. Such an order is not merely permitted by federal law, but indeed beyond the jurisdiction of federal appellate review.

Res judicata was more than a theoretical issue in the *Mansell* litigation. After this Court's reversal, the case returned to the California Court of Appeals. Despite this Court's published opinion, that court refused to hold that the husband's veterans' disability benefits were separate property. "The Supreme Court's [opinion] does not change the question on review; it merely requires that we view it from a different perspective." *Mansell v. Mansell*, 217 Cal. App. 3d 219, 265 Cal. Rptr. 227, 231 (1989). Considering directly the issue of whether res judicata prevented reopening of the divorce decree, the court held that the facts showed no basis for reopening the judgment under California law. Even though the original trial court acted improperly by dividing disability benefits, the husband "consented to said act when he signed the stipulated property settlement agreement, and he is therefore barred from complaining." 265 Cal. Rptr. at 233. Because the divorce decree could not be reopened under California law, the court once again affirmed the trial court decision denying the husband relief, and ordering him to

continue paying the wife 50% of his veterans' disability benefits.

The husband filed a second petition, styled as a Petition For Writ Of Mandamus Or Certiorari, to review the post-remand *Mansell* decision, but the Petition was denied. *Mansell v. Mansell*, 498 U.S. 806 (1990).[2] The end result of the *Mansell* litigation was therefore that the husband's disability benefits were actually divided, under a theory of res judicata.

This Court has also approved res judicata as a basis for dividing military service benefits upon divorce in an opinion with precedential value. *Mansell* did not create a new rule of federal preemption; it merely upheld the continuing validity of the broader opinion in *McCarty v. McCarty*, 453 U.S. 210 (1981). *McCarty* held that federal law prevented division of any post-retirement military service benefit upon divorce.

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[2]The wife recognizes the fundamental axiom that a denial of certiorari is not an adjudication on the merits. *Hopfmann v. Connolly*, 471 U.S. 459, 461 (1985); *Maryland v. Baltimore Radio Show*, 338 U.S. 912 (1950) (opinion of Justice Frankfurter denying certiorari). Nevertheless, a denial of certiorari does establish the opinion under review as law of the case in the specific proceedings involved. *E.g., Constant v. United States*, 929 F.2d 654, 657 (Fed. Cir. 1991) ("[T]he denial of his petition for certiorari made the legal conclusions in our prior decision final and law of the case"). Thus, the denial of the second petition for certiorari in *Mansell* established *for purposes of the Mansell litigation* that the husband's veterans' disability benefits were properly divided on a theory of res judicata, the basis set forth in the post-remand California decision. That fact in turn is additional evidence that the Court meant what it said in footnote 5 of its *Mansell* opinion, stating that division of disability benefits based upon state law principles of res judicata would not present a federal question.

After *McCarty* was decided, Congress enacted 10 U.S.C. § 1408 (2003), which permits division of military retirement pay under certain conditions, but which is silent on disability benefits. *Mansell* held that § 1408 overruled *McCarty* only with respect to benefits which were expressly declared to be divisible, and that statute did not overrule the broad preemption rule of *McCarty*. Thus, *McCarty* created the rule; *Mansell* confirmed that the rule remained valid where not expressly overturned by § 1408.

In a case decided shortly after *McCarty*, the courts of California expressly and directly held that *McCarty* did not prevent division of military retirement benefits on a theory of res judicata. *In re Marriage of Sheldon*, 124 Cal. App. 3d 371, 177 Cal. Rptr. 380 (1981). This Court refused to grant a Petition For Certiorari, but it did not simply deny the Petition. Instead, the Petition was dismissed for want of a substantial federal question. *Sheldon v. Sheldon*, 456 U.S. 941 (1982). Dismissal for want of a substantial federal question is an adjudication on the merits. *Hicks v. Miranda*, 422 U.S. 332, 344 (1975); *White v. White*, 731 F.2d 1440, 1443 (9th Cir. 1984); *Evans v. Evans*, 75 Md. App. 364, 541 A.2d 648 (1988) (specifically recognizing the precedential effect of the dismissal in *Sheldon*). *Sheldon* is therefore precedential authority from this Court agreeing with footnote 5 in *Mansell* that state courts may divide post-divorce military service benefits under a theory of res judicata, even if the original order dividing those benefits violated federal law.

In the present case, the parties' consent divorce decree expressly sets forth a list of "certain community property" (App. 13a). Item 14 on that list includes "military disability in the amount of $174" per month (*id.*), all of the disability benefits to which the husband was then entitled. While the veterans' disability benefits described were awarded to the husband, the consent decree clearly makes a finding of law that all items on the list, including the husband's disability

benefits were community property. Since a consent decree is both a judgment and a contract, *Frew By and Through Frew v. Hawkins*, 124 S. Ct. 899, 903 (2004); *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 237 n.10 (1975), the decree is binding on the husband with the same force as any other court judgment.

The consent divorce decree's finding that the husband's disability benefits were community property is a clear violation of the petitioner husband's interpretation of *McCarty* and *Mansell*. If state divorce courts are not permitted to treat veterans' disability benefits as community property, why did the husband sign a consent divorce decree treating his disability benefits as community property? Given that such a decree was entered, why did the husband not raise his federal law issues in a direct appeal from the divorce decree? There is tremendous inconsistency between the words of the husband's present Petition For Certiorari, and the husband's own actions in signing and failing to appeal the consent decree.

The wife realizes that the consent divorce decree did not actually divide the husband's disability benefits. But Nevada state law does not require that all benefits described as community property be actually divided. *E.g., Fox v. Fox*, 81 Nev. 186, 196, 401 P.2d 53, 58 (1965) ("The court was not compelled to make an exact equal distribution to the parties of either the community property itself or the value thereof"). Property settlements in divorce cases, whether made by agreement or court decree, often divide the community estate by giving each spouse full ownership of some assets. *E.g.*, 401 P.2d at 58. For example, a settlement might make an equal division by giving the husband his retirement benefits, and the wife a marital home of equivalent present value. Since the consent divorce decree clearly described the husband's disability benefits as community property, the parties and the court necessarily must have taken those benefits into account

in determining the overall distribution of the entire community estate. Even though they were not actually divided, they were still treated as community property by the consent divorce decree, which the husband requested and then failed to appeal.

Moreover, the Nevada Supreme Court clearly construed the consent divorce decree to award the wife $577 per month from the husband, so long as the husband has any source from which the payments can be made other than disability benefits. This holding is a pure matter of state contract law; construction of a state court divorce decree is not a federal question. Indeed, the husband's Petition does not seem to argue that this court can review the construction question. He argues only that the state court's construction violates federal law. But the state court was construing the original consent divorce decree, which the husband requested and failed to appeal. Since the decree expressly classified the husband's disability benefits as community property, its construction by the state court is surely not unreasonable or unforeseeable.

Because the husband lost the state law construction issue in state court, the decree has provided ever since its entry that the husband must pay the wife $577 per month from his assets, other than veterans' disability benefits. If that construction violated federal law, the husband's remedy was to refuse to agree to the consent decree, raise his federal law arguments in the original divorce hearing, and appeal any adverse judgment to this Court. By signing the consent judgment and failing to appeal from it, the husband lost any argument that the decree violated federal law.

The wife recognizes that the Nevada Supreme Court did not expressly rely upon res judicata. Like the first California appellate opinion in *Mansell*, the present opinion does not reach the question, finding instead that the benefits

at issue are divisible under contract law. But the wife "may, of course, defend the judgment below on any ground which the law and the record permit." *Smith v. Phillips*, 455 U.S. 209, 215 n.6 (1982). "In the review of judicial proceedings the rule is settled that, if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason." *Helvering v. Gowran*, 302 U.S. 238, 245 (1937).

The wife argued res judicata in the Nevada Supreme Court. In its opinion, the court below expressly held that disability benefits can be divided under res judicata (App. 6a n. 14), and it expressly construed the original consent divorce decree to award the wife $577 per month regardless of source (App. 9a). While the court below chose to rely on a broader holding that federal substantive law permits division of disability pay by contract, this Court reviews the result reached, not the reasoning used. If the judgment below can actually be defended on the basis of res judicata, it must be affirmed upon review by this Court. *Helvering*.

A favorable ~~ruling on~~ res judicata is in any event implicit in the holding below. The state court clearly held that the consent divorce decree, which the husband did not appeal, awarded the wife $577 per month regardless of source. There can further be no doubt that the consent divorce decree described the husband's disability benefits as community property. The state court did not add language to the consent divorce decree on either point; the language to which the husband objects has been present in the decree since it was entered. Thus, the husband could and should have raised his federal law issues in appeal from that decree.

If this Court were to rule against the wife on the substantive question presented here, the wife would be free to reassert her procedural res judicata argument upon remand. The Nevada courts would then be free to find—*as the California*

Court of Appeals actually did find on remand in Mansell – that the consent divorce decree is beyond collateral attack. If the husband were to file a second Petition For Certiorari, this Court could find itself in the awkward position of refusing to review a decision which reaches (under a theory of res judicata) the exact same end result which the Court previously rejected. If the decision below can actually be defended on the basis of res judicata, the prudent option is to dismiss or deny the Petition.

The husband's failure to raise his federal issues on appeal from the consent divorce decree inflicted substantial prejudice upon the wife. If the husband had raised his federal issue at that time, and this Court had agreed with the husband that the benefits at issue cannot be divided under the law of contracts, the wife would have had alternate remedies. In particular, she would certainly have asked the original trial court to reserve jurisdiction to make an award of alimony in response to any increased financial need arising from a future waiver of military retirement benefits by the husband.[3] By waiting until the present time to raise his federal issues, the husband has deprived the wife and the state court of their ability to adjust other portions of the divorce decree in response to this Court's holding. The loss of that ability unfairly prejudices the wife. It is not unreasonable to insist that those who desire to invoke rights under *Mansell* refrain

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[3] *E.g., Kramer v. Kramer*, 252 Neb. 526, 567 N.W.2d 100 (1997) (*Mansell* did not prevent state court from granting additional alimony to wife, who needed support after husband extinguished her share of his military retirement benefits by electing to receive disability benefits). If the husband's federal law arguments had succeeded on the merits, the consent divorce decree would have been reversed, so the wife's waiver of alimony in that decree would not have been an obstacle.

from consenting to a divorce decree classifying veterans' disability benefits as community property, and that they appeal from such a decree if it is granted.

The Nevada Supreme Court in this case did not divide disability benefits as a matter of first instance. It construed a final state court judgment to award the wife $577 per month from the husband, regardless of source, and it enforced that judgment against the husband. The construction of state court consent divorce decrees is surely not a federal question. If the husband believed that the consent decree violated federal law, his remedy was to appeal from the consent decree. Because the husband filed no such appeal, and allowed the consent divorce decree to become a final judgment, the state court judgment at issue was proper under the state law principles of res judicata. The Petition For Certiorari should be dismissed for lack of substantial federal question, or in the alternative simply denied.

II. FEDERAL LAW DOES NOT PREVENT STATE COURTS FROM MAKING AN AWARD OF INDEMNITY, UNDER THE COMMON LAW OF CONTRACTS, AGAINST A PERSON WHO WAIVES MILITARY RETIREMENT BENEFITS, THEREBY DEPRIVING HIS FORMER SPOUSE OF A LEGAL INTEREST IN THOSE BENEFITS ESTABLISHED BY A PREVIOUS FINAL CONSENT JUDGMENT.

Before considering this issue, it is important to have a clear understanding of the state court holding in this case. The state court did not divide the husband's veterans' disability benefits. Every dollar of those benefits has gone and continues to go directly to the husband.

Instead, the wife sought and the Nevada Supreme Court essentially permitted an award of damages against the husband. The basis for that award was the theory of indemnity, a part of the common law of contracts. Under that theory, if O signs a contract agreeing to transfer Blackacre to A, but then actually transfers Blackacre to B, the transfer to B is a breach of the contract between O and A. Without rescinding the transfer to B, who may well be a bona fide purchaser with no awareness of O's wrongdoing, the court is permitted to make an award of damages to A. *See generally* Restatement (Second) of Contracts §§ 250(b), 253(1) (1981); *Hilton Hotels v. Butch Lewis Productions, Inc.*, 107 Nev. 226, 808 P.2d 919 (1991) (parties to a contract have an implied obligation not to destroy the right of other parties to receive benefits under a contract).

In this case, the husband agreed to a consent divorce decree which gave the wife $577 from his military retirement benefits. He then voluntarily waived military retirement benefits to receive increased veterans' disability benefits. The effect of this voluntary waiver was to deprive the wife of the $577 per month in retirement benefits which the husband promised to pay her. The wife does not seek any portion of the husband's disability benefits. She recognizes that those benefits belong to the husband, just as in the above hypothetical, Blackacre belongs to B. But the husband cannot expect to escape all consequences of his breach of contract. The wife seeks exactly the same remedy as in the above hypothetical: an award of damages under the common-law theory of contractual indemnity.

The award of damages at issue here is not at all similar to division of disability benefits. To begin with, the amount of the wife's award does not depend at all on the amount of disability benefits received by the husband. The husband is not being forced to share disability benefits with his wife; he is being forced to pay damages for depriving the wife of her

contractual right to receive $577 per month from his retirement benefits. The amount received by the wife would not decrease if Congress halved the amount of the husband's disability benefits, or even eliminated those benefits entirely. Likewise, the wife's award would not increase if Congress doubled the amount of the husband's disability benefits. Indeed, the result would be the same even if the husband had voluntarily waived military retirement pay for some purpose which had no relationship to disability benefits.[4] The wife's award bears absolutely no relationship to the amount of disability benefits received by the husband.

Moreover, the decision below expressly suggests that the award of damages to the wife will not invade any of the husband's disability pay. "Roland possesses ample other assets from which to pay his obligation without ever touching his disability pay" (App. 9a). Thus, under the decision below, the husband will continue to receive all of his disability

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[4]Such awards have actually been made in several reported decisions. The most significant is *In re Marriage of Gaddis*, 191 Ariz. 467, 470, 957 P.2d 1010, 1013 (Ct. App. 1997), *cert. denied*, 525 U.S. 826, *reh'g denied*, 525 U.S. 1013 (1998), holding that the husband must compensate the wife for military retirement benefits waived to receive post-divorce civil service retirement benefits. *See also In re Marriage of Beltran*, 183 Cal. App. 3d 292, 227 Cal. Rptr. 924 (1986) (making similar award against husband who lost retirement benefits after military tribunal convicted him of sexual misconduct with a minor); *Collins v. Collins*, 139 Ohio App. 3d 900, 746 N.E.2d 201 (2000) (making similar award against husband who lost unvested military retirement benefits through simple failure to reenlist); *Leadingham v. Leadingham*, 120 Ohio App. 3d 496, 698 N.E.2d 465 (1997) (making similar award against husband who lost private civilian pension when he was fired for drug abuse).

benefits, and he will not be required to share any part of those benefits with the wife. The decision below did not divide disability benefits; it awarded contract-law damages against the husband for failing to comply with his agreement to pay the wife$577 per month in retirement benefits.

The Petition For Certiorari relies upon essentially two sources: federal law preventing state courts from dividing disability benefits under the law of community property or equitable distribution, *Mansell* and 38 U.S.C. § 5301 (Westlaw 2004), which prevents recipients of veterans' disability pay from assigning it to others. Neither of these two sources provides any support for the husband's position. Veterans' disability benefits have not been divided under community property law, equitable distribution law, contract law, or any other law, because the husband alone retains every dollar of disability pay he collects. The wife's award can be fully satisfied from the husband's nondisability assets. An award of contract law damages against the husband, made from assets outside the scope of *Mansell*, does not violate federal law.

Section 5301 is irrelevant for the same reason: no assignment of veterans' disability benefits has occurred. The husband never promised to give the wife any portion of his disability benefits; the wife never claimed such a portion; and no state court ever awarded such a portion. An award of contract law damages against the husband, payable fully from nondisability assets, is simply not an assignment of veterans' disability pay.

The wife also notes that § 5301 has generally been construed to protect recipients only against third-party creditors, and not against family members. In particular, in *Rose v. Rose*, 481 U.S. 619 (1987), the Court held that the statute (then numbered as 38 U.S.C. § 3101) did not prevent disability benefits from being used as a source for child support. The

court reasoned that the disability benefits were intended by Congress to support "disabled veterans *and their families*." *Id.* at 630 (quoting S. Rep. No. 98-204 at 24, 1984 U.S.C.C.A.N. 4479, 4488) (Court's emphasis). "Congress clearly intended veterans' disability benefits to be used, in part, for the support of veterans' dependents." *Rose*, 481 U.S. at 631. For precisely the same reason, the anti-assignment clause does not bar voluntary agreements to divide veterans' disability benefits. The assignment is made not to benefit a third-party creditor, but to benefit a family member – a person within the class of persons Congress intended to benefit.

The Petition seems to suggest that the Court should reconsider *Rose*'s holding that veterans' disability benefits are intended for the benefit of the veteran's family (Petition at 16, 20-21). *There is not the slightest indication that Congress intended to give disabled veterans free license to ignore their family responsibilities.* The recent amendment to § 5301, quoted in the Petition at 20, provides no indication on its face that it bars assignments to family members. Indeed, the failure of Congress to expressly extend § 5301 to bar assignments to family members provides a strong indication that Congress approves of the *Rose* decision. The Petition misses no chance to claim that Congress has approved of the 1989 decision in *Mansell* by failing to overrule it, yet persists in arguing that Congress's failure to overrule the 1987 decision in *Rose* means little. From all indications, Congress continues to be committed to the position that veterans' disability benefits are intended, in part, to support veterans' dependents.

The issue presented here may not recur frequently in future cases. As the Petition recognizes (Petition at 2 n.1), federal law has begun to permit some military retirees to receive both veterans' disability benefits and military retirement pay. National Defense Authorization Act, Pub. L. No. 108-136, § 641, 117 Stat. 1392 (2003). Concurrent receipt of both benefits eliminates the need for election, thus avoiding

the waiver issue which lies at the heart of both *Mansell* and the present case. While concurrent receipt is being phased in rather than adopted immediately, its full adoption would render the present issue moot in the great majority of cases, as receipt of disability benefits would not reduce the share of retirement benefits payable to a former spouse.

The decision below is far from the first case to make an award of contractual indemnity against a husband who waived military retirement pay to receive other benefits. On the contrary, the great majority of state courts to consider the issue have found that this sort of award does not violate federal law.

One of the first decisions to address the issue is *Owen v. Owen*, 14 Va. App. 623, 419 S.E.2d 267 (1992). In that case, the parties' separation agreement divided the husband's military retirement pay. Included in the agreement was a specific express promise by the husband that he would not take action to defeat the wife's award. When the husband subsequently elected to receive disability pay, the wife sought and obtained an award of damages for violation of the agreement and decree. The Virginia Court of Appeals expressly affirmed this award, holding that it was an award of damages and not a division of any specific benefit. "Such an arrangement does not offend the federal prohibition against a direct assignment of veterans' disability pay by property settlement agreement." 419 S.E.2d at 269.

For additional state court cases holding that enforcement of an express indemnity provision does not violate federal law, see *Janovic v. Janovic*, 814 So. 2d 1096 (Fla. Dist. Ct. App. 2002); *In re Strassner*, 895 S.W.2d 614, 618 (Mo. Ct. App. 1995) ("[T]he trial court did not prospectively divide disability benefits, but instead provided a manner of enforcing the property division contained in the original decree"); *Scheidel v. Scheidel*, 129 N.M. 223, 4 P.3d 670 (Ct. App. 2000).

For additional cases holding that enforcement of an indemnity clause does not violate *Mansell*, while remanding on the state law question of whether such a provision was present on the facts, see *Harris v. Harris*, 195 Ariz. 559, 991 P.2d 262 (Ct. App. 1999), and *In re Marriage of Krempin*, 70 Cal. App. 4th 1008, 83 Cal. Rptr. 2d 134 (1999).

The wife recognizes that the agreement in this case does not contain an express indemnity clause. Instead, the Nevada Supreme Court construed the agreement to contain an implied indemnity clause. The presence of an indemnity obligation is a pure question of state contract law, over which this Court has no jurisdiction. The Nevada decision is fully consistent with years of contract law jurisprudence, summarized in Restatement (Second) of Contracts §§ 250(b), 253(1) (1981), holding that a person who contracts to give property to one person must pay damages if he conveys it to another. Since the highest court of state resort has already found an implied indemnity obligation to be present here, the presence of that obligation is settled. The only federal issue is whether the obligation violates *Mansell*.

Other state courts have recognized this point by enforcing an implied indemnity obligation. In *McHugh v. McHugh*, 124 Idaho 543, 861 P.2d 113 (Ct. App. 1993), the husband agreed to pay the wife a portion of his military retirement pay. The agreement further provided that the amount of military retirement pay would not be increased or decreased in the future. There was no express indemnity provision. The husband subsequently elected to receive increased disability pay, reducing his retirement pay, and the wife sought an order enforcing the husband's obligation to continue paying the original amount. The trial court entered such an order, reasoning that it was entitled to enforce the plain language of the agreement. On appeal, the court expressly held that the trial court had not violated federal law:

> The parties negotiated for and *mutually agreed* to a division of military retirement pay which granted Elisabet a specific monthly sum. They further agreed that this sum would not be increased or decreased in the future "for any reason" except by application of cost of living increases. The two supplemental orders issued by the court did not alter this agreed-to division of the asset, but served simply to enforce it. In short, there is no new division of the retirement pay, and Richard's argument [for federal preemption] does not apply.

861 P.2d at 115. Thus, the court expressly held that federal law permits the court to enforce a prior order incorporating an agreement in which the husband had promised to pay the wife *retirement* benefits. *See also Troxell v. Troxell*, 28 P.3d 1169 (Okla. Ct. App. 2001) (likewise holding that an order to pay a portion of military retirement pay remains binding, even if the husband waives military retirement pay for disability benefits, so long as the order is enforced against other assets and not disability benefits).

An excellent recent state court opinion applying the theory is *In re Marriage of Neilsen*, 341 Ill. App. 3d 863, 792 N.E.2d 844 (2003). There, as in this case, the parties signed an agreed order dividing the husband's military retirement benefits. Some years later, the husband retired and elected to receive disability benefits. The trial court initially made an award of indemnity, equal to the amount of *retirement* benefits lost by the wife when the husband elected disability benefits. It then changed course, however, and stated the award as 22.5% of the husband's retirement and disability pay.

The Illinois Court of Appeals reversed the second order, holding that the direct award of a percentage of the husband's disability pay was a clear violation of *Mansell*. But

the court expressly held that the first order entered by the trial court was consistent with federal law, so long as it was payable from the husband's nondisability assets:

> Mark certainly had a legal right to receive disability benefits, but his doing so caused a diminution in the amount of his retirement pay that Susan had been receiving for over three years. Mark's decision frustrated the parties' intent and the trial court's judgment for dissolution. Indeed, to allow Mark to unilaterally diminish Susan's interest in his military pension would constitute an impermissible modification of a division of marital property. As such, we affirm the trial court's order of November 3, 2000, in which it ruled that Susan was entitled to an amount equal to 25% of Mark's military pension as it existed on the date he retired. Because the trial court's November 3, 2000, order does not directly assign Mark's military disability pay, it does not offend the United States Supreme Court's ruling in *Mansell*.

792 N.E.2d at 849. "On remand, the trial court must determine if Mark is free to satisfy his obligation with assets other than his disability benefits, and draft a new order accordingly. This will ensure conformity with *Mansell*." *Id.*

For additional cases enforcing an implied indemnity provision which did not actually award the former spouse a share of disability benefits, see *Dexter v. Dexter*, 105 Md. App. 678, 661 A.2d 171, *cert. denied*, 341 Md. 27, 668 A.2d 36 (1995); *Krapf v. Krapf*, 439 Mass. 97, 786 N.E.2d 318 (2003); *White v. White*, 152 N.C. App. 588, 568 S.E.2d 283 (2002), *aff'd per curiam*, 357 N.C. 153, 579 S.E.2d 248 (2003); *Hisgen v. Hisgen*,

554 N.W.2d 494 (S.D. 1996); and *Johnson v. Johnson*, 37 S.W.3d 892 (Tenn. 2001).

The wife recognizes, of course, that this Court is not bound by any of the above state court opinions. But the Nevada Supreme Court is clearly not alone in holding that an award of indemnity for a lost share of *retirement benefits*, under the common law of contracts, does not violate *Mansell*'s prohibition against division of *disability benefits*. On the contrary, the decision below is supported by the settled consensus of state court decisions. The presence of such a consensus is one significant factor supporting the wife's position.

Accepting the wife's position does not weaken *Mansell* in any material way. In all of the above cases, the initial division of retirement benefits was made by agreement between the parties. The former spouse did not assert any right, under law or contract, to any share of the disability benefits at issue; the former spouse merely demanded compliance with the contract, which was *voluntarily* signed by the service member. Service members who wish to avoid a future award of indemnity need only refrain from agreeing to give a specific amount from their retirement benefits to their former spouses. Moreover, even where a contract exists, none of the cases awards an actual percentage of disability benefits to the innocent spouse, and *Neilsen* actually reversed such an award. The cases therefore fully recognize the fundamental rule of *Mansell* that disability benefits cannot be treated as community property.

In an attempt to generate an issue of policy, the Petition alleges that state courts are divided over the issue of whether veterans' disability benefits can be directly divided by contract. This is indeed so, but the split in authority is not relevant here. The consent divorce decree clearly awards to the husband all of his disability benefits; the wife does not and

the Nevada Supreme Court did not contest the point. This is therefore *not* an appropriate case to resolve the question, noted but not addressed in footnote 6 of *Mansell*, 490 U.S. at 587, of whether a contract dividing disability benefits is enforceable under federal law.[5] Even less appropriate for review are such remedies as redivision of the marital estate or imposition of a constructive trust, as those remedies were neither sought nor imposed in the court below. The Petition requests what would be in effect an advisory opinion on many issues which may be of public interest, but which are not presented by the facts.

If the wife's res judicata argument is rejected, this case does squarely present the single question of whether a state court can make an award of contractual indemnity against a military spouse who waives military retirement benefits after agreeing to pay a portion of those benefits to a former spouse. But this is not a question on which state courts are significantly divided. As noted above, state courts generally agree with the wife's position that an award of contractual indemnity based upon waiver of *retirement* benefits is not equivalent to a division of *disability* benefits. There are, of course, decisions going both ways on the factual question of

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[5]*Mansell*, *McCarty*, and 10 U.S.C. § 1408 limit the ability of state courts to treat disability benefits *as community property*. But when disability benefits are divided by agreement between the parties, they are not necessarily being treated as community property, for contracts dividing a spouse's separate property are universally enforceable under state law. Laura W. Morgan & Brett R. Turner, *Attacking and Defending Marital Agreements* § 3.04 n.9 (2001). The question of whether disability benefits can be divided by contract is therefore much broader than the question of whether disability benefits can be treated as community property, and divided against the will of the owning spouse.

whether an express or implied indemnity provision is present, but that is an issue of contract construction controlled fully by state law.

The Petition's discussion of supporting state law is heavily tainted by its insistence that disability benefits were divided in this case. As noted above, that simply did not happen. Almost all of the state court cases cited by the Petition in support of its position hold simply that federal law prohibits division of *disability benefits*. Those cases are not relevant here, for disability benefits are not being divided.

The only case cited in the Petition which clearly focuses upon the present indemnity theory is *In re Marriage of Pierce*, 982 P.2d 995 (Kan. Ct. App. 1999). *Pierce* was a 2-1 decision holding that no indemnity obligation existed on the facts, as a matter of pure state law. The court strongly suggested that an indemnity obligation would be enforceable if it existed; indeed, it criticized the wife for failing to request that an express indemnity provision be included in the agreement. This criticism makes little sense if the court intended to hold that federal law bars recovery on any indemnity theory. The respondent wife therefore submits that there is no substantial state court authority holding that an award of indemnity (as distinguished from an actual division of disability benefits) is prohibited by *federal* law. If such authority exists, it is very small in comparison to the large body of state court case law applying the indemnity theory.

The mere fact that the husband's disability benefits cannot be divided under the law of community property, as a matter of substantive federal law, does not mean that federal law bars an award of indemnity if the election of those benefits breaches a contract. In *Mobil Oil Exploration & Producing Southeast, Inc. v. United States*, 530 U.S. 604 (2000), an oil company applied for a license to drill for oil off the North Carolina coast. It signed a lease with the federal government,

in which the government promised to grant the license if the proper requirements were met. The requirements were met, but shortly before the government certified this fact, new federal legislation was passed placing a moratorium on the licenses at issue. Based upon the new legislation, the government denied the license, and the company sued for breach of contract. This Court held that the new legislation was a voluntary action taken by one party to the contract (the United States) which rendered performance impossible. Therefore, the enactment of the legislation was a breach of the contract. The court expressly rejected the dissent's view that adoption of legislation is not the type of action which can constitute breach of contract. There is no doubt that federal law permits Congress to enact a moratorium on oil drilling licenses, but there is equally no doubt that the government must pay damages if it uses that power to breach an existing contract. Likewise, while no one doubts that substantive federal law prohibits a state court from dividing veterans' disability benefits under a theory of community property, a spouse who elects those benefits must still pay damages if the election deprives a former spouse of *retirement* benefits due under an existing contract.

The Petition makes the amazing suggestion that the present case does not involve an indemnity obligation (Petition at 18). There is admittedly no express indemnity obligation in the consent divorce decree. But the law of contracts clearly provides that a promise to give Blackacre to A contains an implied promise not to give Blackacre to B. Restatement (Second) of Contracts §§ 250(b), 253(1). By agreeing to give the wife $577 per month from his retirement benefits, the husband implicitly agreed not to give that same $577 to anyone else, including to the federal government as part of a waiver of military retirement pay. Thus, the Nevada Supreme Court construed the present agreement to contain an implied indemnity provision. The court could conceivably have ruled otherwise, for as the court itself noted, the consent

decree of divorce is ambiguous (App. 8a). But the presence of an implied indemnity obligation is a question of contract construction, controlled by state law, and well outside the jurisdiction of this Court. The state court of last resort has held that an implied indemnity obligation exists here, and that state law determination is absolutely binding for purposes of Supreme Court review.

Finally, the Petition at various points asserts that the will of this Court as expressed in *Mansell* is being frustrated. This contention assumes that this Court in *Mansell* decided, as a matter of policy, that military service members have some form of protected right to waive military retirement pay, to the great prejudice of their spouses, and that federal law bars state courts from recognizing any remedy whatsoever for the unfairness.

Mansell, however, was not a policy-based opinion. Every opinion written in *Mansell* recognized that the result reached inflicted serious and arguably unfair harm upon military spouses. The majority opinion did not approve that harm as a matter of policy. It held, rather, that one particular proposed remedy for the harm—division of the benefits at issue under the law of community property—was inconsistent with the holding in *McCarty* that division of such benefits requires express Congressional authorization.

At no point did *Mansell* hold that other remedies for the same harm could not be recognized. On the contrary, as discussed in part I *supra*, footnote 5 of *Mansell* expressly held that federal law would permit division of disability benefits under a theory of res judicata, and the benefits at issue in *Mansell* were ultimately divided on that basis upon remand. Likewise, footnote 6 noted but refused to resolve the question of whether a property settlement agreement dividing veterans' disability benefits can be enforced under the common law of contracts. There is no indication in *Mansell* that this Court

adopted any rule of policy against mitigating the harm which results from a waiver of military retirement pay – so long as the remedy chosen is consistent with federal law.

The remedy applied by the Nevada Supreme Court in this case does not violate any principle of federal law. It gives the wife no interest in the husband's veterans' disability benefits. It can be fully satisfied without invading a single dollar that the husband receives as disability benefits from the federal government. Its amount is not tied in any way to the amount of the husband's disability benefits. All the state court has done is to award damages against the husband for waiving his military retirement benefits, in the face of a contract and consent divorce decree promising to pay the wife $577 per month from those benefits. The award can be paid from the husband's nondisability assets alone. This is not a violation of federal law; it is a routine award of damages under the state law of contractual indemnity. Such an award does not violate *Mansell*.

CONCLUSION

For the reasons stated above, the respondent wife respectfully requests that the Petition For Writ Of Certiorari be dismissed for lack of a substantial federal question, or in the alternative simply denied.

James L. Buchanan II
Counsel of Record for Respondent

David C. Amesbury
Of Counsel